

1 Daniel S. Belsky, Esq. (SBN 75810)  
 Vincent J. Iuliano, Esq. (SBN 153594)  
 2 Bruce W. Boetter, Esq. (SBN 188376)  
**BELSKY & ASSOCIATES**  
 3 591 Camino de la Reina, Suite 640  
 San Diego, CA 92108  
 4 Telephone: (619) 497-2900  
 Facsimile: (619) 497-2901  
 5

(SPACE BELOW FOR FILING STAMP ONLY)

6 Lawrence A. Cox, Esq. (SBN 076140)  
 Brian K. Condon, Esq. (SBN 138776)  
 7 Courtney Stuart-Alban, Esq. (SBN 225513)  
**ARNOLD & PORTER LLP**  
 8 777 South Figueroa Street, 44<sup>th</sup> Floor  
 Los Angeles, CA 90017  
 9 Telephone: (213) 243-4000  
 Facsimile: (213) 243-4199  
 10

11 Attorneys for Defendants

CELESTINE ARAMBULO, D.O., (erroneously sued and served as DR. C. ARAMBULO),  
 12 KAISER FOUNDATION HOSPITALS, SOUTHERN CALIFORNIA PERMANENTE  
 MEDICAL GROUP, and KAISER FOUNDATION HEALTH PLAN, INC.  
 13

14 **UNITED STATES DISTRICT COURT**

15 **FOR THE SOUTHERN DISTRICT OF CALIFORNIA**

16 FRANZISKA I. COLLIER, individually, and as Civil Action No. 08cv0969-L (POR)  
 Administrator of the Estate of Edgar T. Collier,  
 17 Deceased; KEA JADE COLLIER, a Minor, by **DEFENDANTS CELESTINE ARAMBULO,**  
 her Guardian Ad Litem, MICHAEL HYDE, **D.O., KAISER FOUNDATION HOSPITALS,**  
 18 **SOUTHERN CALIFORNIA PERMANENTE**  
 Plaintiffs, **MEDICAL GROUP, and KAISER**  
 19 **FOUNDATION HEALTH PLAN, INC.'S EX**  
 v. **PARTE APPLICATION FOR**  
 20 **RECONSIDERATION OF THE COURT'S**  
**ORDER REMANDING THE CASE TO**  
 21 **STATE COURT**  
 PARADISE HILLS CONVALESCENT  
 CENTER, a business entity, form unknown; DR.)  
 22 GAYNSKI; DR. C. ARAMBULO; KAISER  
 FOUNDATION HOSPITALS; SOUTHERN) DATE:  
 CALIFORNIA PERMANENTE MEDICAL) TIME:  
 23 GROUP; KAISER FOUNDATION HEALTH) COURTROOM:  
 PLAN, INC.; and DOES 1 through 100,) IC JUDGE: HON. M. JAMES LORENZ  
 24 inclusive, ) MAGISTRATE: HON. LOUISA PORTER  
 Defendants. )  
 ) CASE FILED: MAY 30, 2008  
 ) TRIAL DATE: NONE SET  
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1 TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

2 PLEASE TAKE NOTICE that on a date and time to be determined by the court, in front of  
 3 Hon. M. James Lorenz in the above-entitled court, located at 880 Front Street, San Diego, CA 92101,  
 4 Defendants CELESTINE ARAMBULO, D.O., KAISER FOUNDATION HOSPITALS, SOUTHERN  
 5 CALIFORNIA PERMANENTE MEDICAL GROUP, and KAISER FOUNDATION HEALTH  
 6 PLAN, INC. (hereinafter "KAISER") will and hereby do move the Court for a reconsideration of: 1)  
 7 the Court's June 30, 2008 Order remanding the case to state court; and 2) the Court's rejection of  
 8 PARADISE HILLS' Joinder in the Notice of Removal filed by KAISER on May 30, 2008. KAISER  
 9 requests that the Court vacate its remand order and re-open the federal court case.

10 The motion is based on the facts that: 1) the Court erred in ruling that Defendants failed to  
 11 explain the absence of co-defendants in the Notice for Removal, and 2) co-defendant PARADISE  
 12 HILLS CONVALESCENT CENTER timely filed a *Joinder in Removal* which was erroneously  
 13 rejected by the Court clerk because the clerk apparently considered it a Notice of *Removal* after the  
 14 case had already been removed.

15 This Motion is based on this Notice of Motion and Motion, the Memorandum of Points and  
 16 Authorities filed herewith, the Declaration of Vincent J. Iuliano, Esq., the pleadings and papers on  
 17 file herein, and upon such other matters as may be presented to the Court at the time of the hearing.

18  
 19 Respectfully Submitted,

20 BELSKY & ASSOCIATES

21  
 22 Dated: 7/15, 2008

By: 

Daniel S. Belsky, Esq.

Vincent J. Iuliano, Esq.

Bruce W. Boetter, Esq.

Attorneys for Defendants

CELESTINE ARAMBULO, D.O., KAISER  
 FOUNDATION HOSPITALS, SOUTHERN  
 CALIFORNIA PERMANENTE MEDICAL GROUP, and  
 KAISER FOUNDATION HEALTH PLAN, INC.

1 Daniel S. Belsky, Esq. (SBN 75810)  
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 9 Telephone: (213) 243-4000  
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11 Attorneys for Defendants

CELESTINE ARAMBULO, D.O., (erroneously sued and served as DR. C. ARAMBULO),  
 12 KAISER FOUNDATION HOSPITALS, SOUTHERN CALIFORNIA PERMANENTE  
 MEDICAL GROUP, and KAISER FOUNDATION HEALTH PLAN, INC.  
 13

14 **UNITED STATES DISTRICT COURT**

15 **FOR THE SOUTHERN DISTRICT OF CALIFORNIA**

16 FRANZISKA I. COLLIER, individually, and as) Civil Action No. 08cv0969-L (POR)  
 Administrator of the Estate of Edgar T. Collier,)

17 Deceased; KEA JADE COLLIER, a Minor, by) **DEFENDANTS CELESTINE ARAMBULO,**  
 her Guardian Ad Litem, MICHAEL HYDE, ) **D.O., KAISER FOUNDATION HOSPITALS,**  
 18 ) **SOUTHERN CALIFORNIA PERMANENTE**  
 Plaintiffs, ) **MEDICAL GROUP, and KAISER**  
 19 ) **FOUNDATION HEALTH PLAN, INC.'S**

20 v. ) **MEMORANDUM OF POINTS AND**  
 ) **AUTHORITIES IN SUPPORT OF *EX PARTE***  
 ) **APPLICATION FOR RECONSIDERATION**  
 21 ) **OF THE COURT'S ORDER REMANDING**  
 PARADISE HILLS CONVALESCENT) **THE CASE TO STATE COURT**  
 CENTER, a business entity, form unknown; DR.)  
 22 GAYNSKI; DR. C. ARAMBULO; KAISER)  
 FOUNDATION HOSPITALS; SOUTHERN)  
 23 CALIFORNIA PERMANENTE MEDICAL) DATE:  
 GROUP; KAISER FOUNDATION HEALTH) TIME:  
 24 PLAN, INC.; and DOES 1 through 100,) COURTROOM:

25 inclusive, )  
 ) IC JUDGE: HON. M. JAMES LORENZ  
 26 Defendants. ) MAGISTRATE: HON. LOUISA PORTER  
 )  
 ) CASE FILED: MAY 30, 2008  
 ) TRIAL DATE: NONE SET  
 27

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1 Defendants CELESTINE ARAMBULO, D.O., KAISER FOUNDATION HOSPITALS,  
 2 SOUTHERN CALIFORNIA PERMANENTE MEDICAL GROUP, and KAISER FOUNDATION  
 3 HEALTH PLAN, INC. submit this Memorandum of Points and Authorities in support of their Motion  
 4 for Reconsideration of the Court's June 30, 2008 Order remanding the case back to state court and the  
 5 Court's rejection of the Joinder in the Notice of Removal filed by co-defendant PARADISE HILLS  
 6 CONVALESCENT CENTER.

# 7 I.

## 8 BACKGROUND

9 On September 17, 2007, Plaintiffs filed this action against Defendants in the Superior Court  
 10 of the State of California, County of San Diego - Central Division. However, Defendants  
 11 CELESTINE ARAMBULO, D.O., KAISER FOUNDATION HOSPITALS, SOUTHERN  
 12 CALIFORNIA PERMANENTE MEDICAL GROUP, and KAISER FOUNDATION HEALTH  
 13 PLAN, INC. (hereinafter "KAISER") were only served with the summons and Second Amended  
 14 Complaint, on or after April 30, 2008. Consistent with the timing requirements of 28 U.S.C. §  
 15 1446(b), these defendants filed a Notice of Removal to federal court on May 30, 2008. The Notice  
 16 of Removal was filed pursuant to 28 U.S.C. § 1441 as an action over which this Court has federal  
 17 question jurisdiction under 28 U.S.C. § 1331. The Court has federal question jurisdiction because  
 18 (1) the Second Amended Complaint raises claims that turn on the construction of a federal  
 19 government contract and federal common law; and (2) the Second Amended Complaint raises claims  
 20 that are "completely preempted" by the Federal Employees Health Benefit Act ("FEHBA"), 5 U.S.C.  
 21 §§ 8901-8914.

22 At the time the Notice of Removal was filed on May 30, 2008, attorneys for KAISER checked  
 23 the Superior Court file for evidence that named co-defendant PARADISE HILLS CONVALESCENT  
 24 CENTER had been served with the Superior Court complaint, and/or had filed a responsive pleading.  
 25 There was no document in the Superior Court file indicating that PARADISE HILLS had been served  
 26 with the Second Amended Complaint. [See Declaration of Vincent J. Iuliano, Esq.]

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1 Attorneys for KAISER also phoned plaintiffs' attorney to discuss the status of the case on  
2 May 22, 2008 and left a message for plaintiff's attorney to call back. However, plaintiff's attorney  
3 never returned the phone call. [See Declaration of Vincent J. Iuliano, Esq.]

4 To reflect the fact that it could not obtain the consent of PARADISE HILLS because this co-  
5 defendant had not yet made an appearance in the case and its counsel, if any, were unknown to  
6 KAISER's attorneys, in its Notice of Removal, KAISER included Paragraph 13 which stated:

7 "All Defendants known to have been served with Plaintiffs' Second Amended  
8 Complaint have consented to this Notice of Removal."

9 [See Notice of Removal, attached as Exhibit 1.] At that time, only the KAISER defendants were  
10 known to have been served with the Second Amended Complaint. [See Declaration of Vincent J.  
11 Iuliano, Esq.]

12 On June 23, 2008, KAISER's attorneys received a letter from counsel for PARADISE HILLS  
13 regarding the fact that PARADISE HILLS had not yet filed responsive pleadings and would not do  
14 so until the removal issue was resolved. [See Letter of Janet G. Martin dated June 23, 2008, attached  
15 as Exhibit 2.] This letter was the first notice that KAISER's attorneys had that PARADISE HILLS  
16 had been served, and were now represented by counsel. [See Declaration of Vincent J. Iuliano, Esq.]

17 On June 24, 2008, PARADISE HILLS attempted to file a Joinder in KAISER's Notice of  
18 Removal. [See Defendant Paradise Hills Convalescent Center's Joinder in Defendants Celestine  
19 Arambulo, D. O., Kaiser Foundation Hospitals, Southern California Permanente Medical Group and  
20 Kaiser Foundation Health Plan, Inc.'s Notice of Removal, attached hereto as Exhibit 3.] The Joinder  
21 signified that PARADISE HILLS, the only remaining defendant who had not formally consented to  
22 removal, was now joining in KAISER's request to have the matter removed to federal court.

23 On June 24, 2008, however, the District Court Clerk returned the Joinder to attorneys for  
24 PARADISE HILLS unfiled, apparently because it mistook the Joinder for an original Notice of  
25 Removal. [See Notice of Document Discrepancies, attached hereto as Exhibit 4.] The clerk's Notice  
26 of Document Discrepancies noted that the document was being returned because "Case has already  
27 been Removed on 5.30.2008 (Doc #1)." This suggests that the clerk was mistakenly considering the

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1 papers filed to be intended to remove the case, rather than just the agreement of one party to the  
2 removal filed by another.

3 On June 30, 2008, the District Court signed an Order Remanding Action to State Court. [See  
4 Order, attached as Exhibit 5.] The Order indicates that "Section 1446 requires all proper defendants  
5 to join or consent to the removal notice." It further notes that "[w]here fewer than all the defendants  
6 have joined in a removal action, the removing party has the burden under section 1446(a) to explain  
7 affirmatively the absence of any co-defendants in the notice for removal (citations omitted). The  
8 language of the Order implies that the Court was not aware: 1) that at the time of the removal on May  
9 30, 2008, KAISER had no way of determining whether PARADISE HILLS would or would not  
10 consent to removal since PARADISE HILLS had not made an appearance in the Superior Court, but  
11 more importantly, 2) that PARADISE HILLS had attempted to signify their joinder in the removal  
12 by filing a Joinder, but that the clerk apparently returned the Joinder unfiled because it misinterpreted  
13 the nature of the document.

14 KAISER asserts that all of the required steps to successfully remove a case from state to  
15 federal court have been undertaken by KAISER and the co-defendant. KAISER respectfully submits  
16 that the Court should reconsider its Order Remanding Action to State Court in light of the fact that  
17 PARADISE HILLS clearly signified its agreement with the removal of the case to federal court prior  
18 to the Court issuing its remand order. KAISER requests that the Court vacate its remand order and  
19 re-open the federal court case.

## 20 II.

### 21 THE DISTRICT COURT HAS THE INHERENT POWER TO RECONSIDER ITS 22 ORDER

23 Although the Federal Rules of Civil Procedure do not expressly authorize a motion for  
24 reconsideration, "(a) district court has the inherent power to reconsider and modify its interlocutory  
25 orders prior to entry of judgment." *Smith v. Massachusetts*, 543 U.S. 462, 475 (2005). A motion for  
26 reconsideration will not be granted, however, "unless the District Court is presented with newly  
27 discovered evidence, committed clear error, or if there is an intervening change in the controlling  
28 law." *Kona Enterprises, Inc. v. Estate of Bishop*, 229 F.3d 877, 890 (9<sup>th</sup> Cir. 2000).



1 Per Local Civil Rule 7.1i, a motion for reconsideration may be filed up to 30 days after the  
2 entry of the ruling, order or judgment sought to be reconsidered.

3 In this case, the Court may not have been aware of the fact that PARADISE HILLS did  
4 attempt to join in KAISER's Notice of Removal on June 24, 2008, but that the Joinder was rejected  
5 by the Court clerk for a reason that appears to have been unjustified. This is a new fact that merits  
6 the reconsideration of the Court's Order to remand the case to Superior Court. Moreover, even  
7 without the Joinder, KAISER's Notice of Removal did explain why it could not obtain the consent  
8 of PARADISE HILLS to the removal when the Notice of Removal was originally filed. KAISER  
9 respectfully requests that the Court reconsider its Order remanding the case to Superior Court because  
10 the case properly belongs in federal court. KAISER also requests that the Court accept PARADISE  
11 HILLS' Joinder in the Notice of Removal, vacate the Remand Order and re-open the federal court  
12 case.

13  
14 Respectfully Submitted,

15 BELSKY & ASSOCIATES

16  
17 Dated: 7/15, 2008

By: 

Daniel S. Belsky, Esq.

Vincent J. Iuliano, Esq.

Bruce W. Boetter, Esq.

Attorneys for Defendants

CELESTINE ARAMBULO, D.O., KAISER  
FOUNDATION HOSPITALS, SOUTHERN  
CALIFORNIA PERMANENTE MEDICAL GROUP, and  
KAISER FOUNDATION HEALTH PLAN, INC.

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Attorneys for Defendants

CELESTINE ARAMBULO, D.O., (erroneously sued and served as DR. C. ARAMBULO),  
 KAISER FOUNDATION HOSPITALS, SOUTHERN CALIFORNIA PERMANENTE  
 MEDICAL GROUP, and KAISER FOUNDATION HEALTH PLAN, INC.

**UNITED STATES DISTRICT COURT**

**FOR THE SOUTHERN DISTRICT OF CALIFORNIA**

FRANZISKA I. COLLIER, individually, and as Administrator of the Estate of Edgar T. Collier, Deceased; KEA JADE COLLIER, a Minor, by her Guardian Ad Litem, MICHAEL HYDE,	Civil Action No. 08cv0969-L (POR)
Plaintiffs,	<b>DECLARATION OF VINCENT J. IULIANO, ESQ.</b>
v.	DATE:
	TIME:
	COURTROOM:
PARADISE HILLS CONVALESCENT CENTER, a business entity, form unknown; DR. GAYNSKI; DR. C. ARAMBULO; KAISER FOUNDATION HOSPITALS; SOUTHERN CALIFORNIA PERMANENTE MEDICAL GROUP; KAISER FOUNDATION HEALTH PLAN, INC.; and DOES 1 through 100, inclusive,	IC JUDGE: HON. M. JAMES LORENZ
Defendants.	MAGISTRATE: HON. LOUISA PORTER
	CASE FILED: MAY 30, 2008
	TRIAL DATE: NONE SET

I, Vincent J. Iuliano, do declare and state:

1. I am an attorney duly licensed to practice law in the State of California and am a shareholder in the law firm of Belsky & Associates, counsel of record for Defendants Celestine Arambulo, D.O., Kaiser Foundation Hospitals, Southern California Permanente Medical Group, and Kaiser Foundation Health Plan, Inc., (hereinafter "Kaiser") in the above-entitled action. I make this declaration based upon my personal knowledge, and if called as a witness, I could and would competently testify to the facts set forth below.



1           2.       The purpose of this *ex parte* application is to request that the Court reconsider its June  
2 30, 2008 Order remanding the case to state court.

3           3.       On September 17, 2007, Plaintiffs filed this action against Defendants in the Superior  
4 Court of the State of California, County of San Diego - Central Division. However, Dr. Arambulo  
5 was not served with the Second Amended Complaint until April 30, 2008, and Kaiser Foundation  
6 Hospitals, Southern California Permanente Medical Group, and Kaiser Foundation Health Plan, Inc.,  
7 were only served with the summons and Second Amended Complaint on May 13, 2008.

8           4.       I subsequently filed a Notice of Removal to federal court on May 30, 2008 on the basis  
9 of federal question jurisdiction.

10          5.       As of the time the Notice of Removal was filed on May 30, 2008, I had my office  
11 check the Superior Court file for evidence that named co-defendant Paradise Hills Convalescent  
12 Center had been served with the Superior Court complaint, and/or had filed a responsive pleading.  
13 This check revealed that there was no document in the Superior Court file indicating that Paradise  
14 Hills had been served with the Second Amended Complaint. I also contacted Plaintiffs' attorney to  
15 discuss the status of the case on May 22, 2008. I left a telephone message for him. However, to this  
16 date, he never responded to my message.

17          6.       To reflect the fact that I could not obtain the consent of Paradise Hills because this co-  
18 defendant had not yet made an appearance in the case and its counsel, if any, were unknown to me,  
19 in the Notice of Removal, I included Paragraph 13 which stated:

20                    "All Defendants known to have been served with Plaintiffs' Second Amended  
21 Complaint have consented to this Notice of Removal."

22 [See Notice of Removal, attached as Exhibit 1.]

23          7.       At that time, only the Kaiser Defendants were known by me to have been served with  
24 the Second Amended Complaint.

25          8.       On June 23, 2008, I received a letter from counsel for Paradise Hills regarding the fact  
26 that Paradise Hills had not yet filed responsive pleadings and would not do so until the removal issue

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1 was resolved. [See Letter of Janet G. Martin dated June 23, 2008, attached as Exhibit 2.] This letter  
2 was the first notice that I had that Paradise Hills had been served, and were now represented by  
3 counsel.

4 9. On June 24, 2008, I spoke to counsel for Paradise Hills regarding the removal of the  
5 case. Ms. Martin advised me that Paradise Hills did not object to the removal, and in fact would join  
6 in it.

7 10. On June 24, 2008, Paradise Hills attempted to file a Joinder in Kaiser's Notice of  
8 Removal. [See Defendant Paradise Hills Convalescent Center's Joinder in Defendants Celestine  
9 Arambulo, D. O., Kaiser Foundation Hospitals, Southern California Permanente Medical Group and  
10 Kaiser Foundation Health Plan, Inc.'s Notice of Removal, attached hereto as Exhibit 3.] I received  
11 a copy of the Joinder on June 25, 2008. The Joinder signified that Paradise Hills, the only remaining  
12 Defendant who had not formally consented to removal, was now joining in Kaiser's request to have  
13 the matter removed to federal court.

14 11. On June 24, 2008, the District Court Clerk returned the Joinder attorneys for Paradise  
15 Hills unfiled, apparently because it mistook the Joinder for an original Notice of Removal. [See  
16 Notice of Document Discrepancies, attached hereto as Exhibit 4.] I was faxed a copy of the Notice  
17 of Document Discrepancies by attorneys for Paradise Hills on June 30, 2008. The clerk's Notice of  
18 Document Discrepancies noted that the document was being returned because "Case has already been  
19 Removed on 5.30.2008 (Doc #1)." This suggests that to me that the clerk was mistakenly considering  
20 the papers filed by Paradise Hills to be intended to remove the case, rather than just the agreement  
21 of one party to the removal filed by another.

22 12. I believe that I acted in good faith and with reasonable due diligence to learn the  
23 identities of all known Defendants served with the Summons and Complaint to confirm their consent  
24 to the removal. I had no information that Paradise Hills was served with the Summons and  
25 Complaint. All I knew was that all known Defendants who were formal parties to this litigation, via  
26 being served with the Summons and Complaint, had consented to the removal. In my judgment, any

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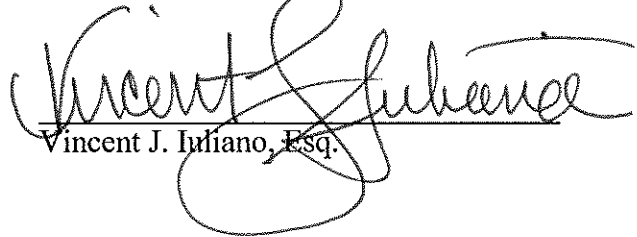
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1 Defendant subsequently brought into the case, then had to object or consent to the removal. In this  
2 case, Paradise Hills consented to that removal. There is no Defendant who has objected to that  
3 removal. The face of the Notice of Removal reflected that fact.

4 13. I believe that because Paradise Hills attempted to manifest its intent to consent to the  
5 removal before the court issued its Remand Order, only to have that attempt apparently wrongly  
6 rejected, fairness and justice requires that Paradise Hills be allowed to file its Joinder or consent to  
7 the removal. If allowed, all Defendants will have consented to the removal and the federal court can  
8 then make a determination as to the federal question raised by the pleadings. I therefore respectfully  
9 request the court to reconsider its Remand Order, accept Paradise Hills' Joinder in the Notice of  
10 Removal, vacate the Remand Order and re-open the federal court case.

11 I declare under penalty of perjury pursuant to the laws of the State of California, that the  
12 foregoing is true and correct.

13 Executed this 11<sup>th</sup> day of July 2008, at San Diego, California.

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15   
16 Vincent J. Iuliano, Esq.  
17  
18  
19  
20  
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**EXHIBIT "1"**

Daniel S. Belsky, Esq. (SBN 75810)  
 Vincent J. Iuliano, Esq. (SBN 153594)  
 Bruce W. Boetter, Esq. (SBN 188376)  
**BELSKY & ASSOCIATES**  
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 San Diego, CA 92108  
 Telephone: (619) 497-2900  
 Facsimile: (619) 497-2901

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FILED MAY 30 PM 1:39

Attorneys for Defendants

CELESTINE ARAMBULO, D.O., (erroneously sued and served as DR. C. ARAMBULO),  
 KAISER FOUNDATION HOSPITALS, SOUTHERN CALIFORNIA PERMANENTE  
 MEDICAL GROUP, and KAISER FOUNDATION HEALTH PLAN, INC.

**UNITED STATES DISTRICT COURT**

**FOR THE SOUTHERN DISTRICT OF CALIFORNIA**

FRANZISKA I. COLLIER, individually, and as  
 Administrator of the Estate of Edgar T. Collier,  
 Deceased; KEA JADE COLLIER, a Minor, by  
 her Guardian Ad Litem, MICHAEL HYDE,

Plaintiffs,

v.

PARADISE HILLS CONVALESCENT  
 CENTER, a business entity, form unknown; DR.  
 GAYNSKI; DR. C. ARAMBULO; KAISER  
 FOUNDATION HOSPITALS; SOUTHERN  
 CALIFORNIA PERMANENTE MEDICAL  
 GROUP; KAISER FOUNDATION HEALTH  
 PLAN, INC.; and DOES 1 through 100,  
 inclusive,

Defendants.

Civil Action No. **'08 CV 0969 L POR**

**DEFENDANTS CELESTINE ARAMBULO,  
 D.O., KAISER FOUNDATION HOSPITALS,  
 SOUTHERN CALIFORNIA PERMANENTE  
 MEDICAL GROUP, and KAISER  
 FOUNDATION HEALTH PLAN, INC.'S  
 NOTICE OF REMOVAL**

Defendants CELESTINE ARAMBULO, D.O., KAISER FOUNDATION HOSPITALS,  
 SOUTHERN CALIFORNIA PERMANENTE MEDICAL GROUP, and KAISER FOUNDATION  
 HEALTH PLAN, INC. respectfully remove this action to the United States District Court for the  
 Southern District of California. In support of the Joint Notice of Removal, Defendants state as  
 follows:

///

///

I.

INTRODUCTION

1. On September 17, 2007, Plaintiffs filed this action against Defendants in the Superior Court of the State of California, County of San Diego - Central Division. However, Defendants were only served with the summons and Second Amended Complaint filed on April 3, 2008, on or after April 30, 2008. A copy of all State Court pleadings and orders served on removing defendants is attached as Exhibit A.

2. Consistent with 28 U.S.C. § 1446(b), this Notice of Removal is being filed within thirty (30) days of the date that Defendants were served with the Summons and Second Amended Complaint in this action.

3. Defendants remove this case pursuant to 28 U.S.C. § 1441 as an action over which this Court has federal question jurisdiction under 28 U.S.C. § 1331. The Court has federal question jurisdiction because (1) the Second Amended Complaint raises claims that turn on the construction of a federal government contract and federal common law; and (2) the Second Amended Complaint raises claims that are "completely preempted" by the Federal Employees Health Benefit Act ("FEHBA"), 5 U.S.C. §§ 8901-8914.

II.

BACKGROUND

4. Plaintiffs in this case are the estate and widow of Edgar T. Collier ("Decedent") and Kea Jade Collier, a minor, by her guardian ad litem, Michael Hyde. In this action, they assert various state and federal law claims against the Decedent's health maintenance organization and health care providers for actions occurring in July 2006.

5. At all times relevant to this suit, the Decedent was enrolled in the federal government's health benefits plan administered by Kaiser (the "Kaiser Federal Plan").

6. The Kaiser Federal Plan was, pursuant to FEHBA, created to provide health benefits for federal government employees and their dependents. It is established by federal government contract between the United States Office of Personnel Management ("OPM") and Kaiser.

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1    ///

2            7.        Federal employees do not enter any contract with Kaiser for coverage; instead, they  
3    "enroll" in the Kaiser Federal Plan pursuant to OPM regulations and receive benefits and services  
4    pursuant to the federal government contract between OPM and Kaiser. 5 U.S.C. § 8905(a); 5 C.F.R.  
5    §§ 890.101(a), 890.120-104, 890.301(d) and subparts C, D, and K.

6            8.        FEHBA and OPM's regulations establish a comprehensive framework for the  
7    supervision and administration of FEHBA plans.

8            a.        Under FEHBA, OPM is vested with the sole authority to contract for the  
9    provision of health plans, to determine the benefit structure for each plan, and to promulgate the  
10   official description of a plan's terms in a Statement of Benefits. See 5 U.S.C. §§ 8902(a), 8907; see  
11   generally Statement of Benefits for the Kaiser Federal Plan attached as Exhibit B.

12           b.        Congress delegated exclusively to OPM the authority to police the conduct and  
13   health care policies and practices of FEHBA carriers, and the agency has promulgated extensive  
14   regulations on the topic. See 5 U.S.C. §§ 8902(e), 8913(a); 48 C.F.R. Chapter 16.

15           c.        FEHBA and OPM's regulations establish that the exclusive remedy for a  
16   purportedly wrongful denial of benefits or services is an administrative appeal at OPM, followed by  
17   judicial review of OPM's decision. OPM has mandated that no court suit shall be brought against  
18   a FEHBA carrier or its subcontractors in association with a denial of benefits or services. See 5  
19   U.S.C. §§ 8902(j), 8912, 5 C.F.R. §§ 890.105, 890.107; 60 Fed. Reg. 16,037 (Mar. 29, 1995); 61 Fed.  
20   Reg. 15,177 (April. 5, 1996).

21           d.        FEHBA contains a broad preemption provision that states: "The terms of any  
22   contract under this chapter which relate to the nature, provision, or extent of coverage or benefits  
23   (including payments with respect to benefits) shall supersede and preempt any State or local law, or  
24   any regulation issued thereunder, which relates to health insurance or plans." 5 U.S.C. § 8902(m)(1)  
25   (2000) (as amended by the Federal Employees Health Care Protection Act of 1998, Pub. L. No.  
26   105-266, § 3(c), 112 Stat. 2363, 2366). In enacting this preemption provision (which amended an  
27   earlier preemption section), Congress's intent was to "confirm" that "FEHB program contract which  
28   relate to the nature or extent of coverage or benefits (including payments with respect to benefits)

1 completely displace State or local law relating to health insurance or plans," to clarify that "this  
 2 preemption authority applies to FEHB program plan contract terms which relate to the provision of  
 3 benefits or coverage, including managed care programs," and "to strengthen the case for trying FEHB  
 4 program claims disputes in Federal courts rather than State courts." H.R. Rep. No. 105-374, at 9, 16  
 5 (1997).

6 9. In the Second Amended Complaint, Plaintiffs allege that in July 2006, there existed  
 7 written agreements for the provision of health care services, which obligates Defendants to make  
 8 decisions concerning the nature and extent of Decedent's medical care and treatment and that  
 9 Defendants were to ensure that Decedent was provided reasonable, necessary and appropriate medical  
 10 care in a timely manner. Plaintiffs contend Decedent's wife is entitled to restitution of funds paid to  
 11 Defendants on Decedent's behalf, amongst other damages. (See Second Amended Complaint, Fourth  
 12 Cause of Action, page 10, line 19 to page 11, line 15.)

13 10. Plaintiffs' Second Amended Complaint also alleges that in July 2006, Defendants  
 14 breached the covenant of good faith and fair dealing in that they made decisions regarding Decedent's  
 15 medical care and treatment because of their own economic interests and contrary to Decedent's best  
 16 interests, that Decedent was denied reasonable, necessary and appropriate services causing him  
 17 injuries and death. (See Second Amended Complaint, Fifth Cause of Action, page 11, line 16 to page  
 18 12, line 21.)

### 19 III.

#### 20 GROUND FOR REMOVAL

21 11. The Court has federal question jurisdiction under 28 U.S.C. § 1331, and thus removal  
 22 jurisdiction under 28 U.S.C. § 1441, on each of the following independent bases:

23 a. One or more of Plaintiffs' claims turns on the construction of federal common  
 24 law and is thereby removable. Federal common law exclusively governs claims that concern the  
 25 interpretation of FEHBA contracts; that allege fraudulent, deceptive, or similarly wrongful conduct  
 26 on the part of FEHBA carriers or their subcontractors in the course of providing services to FEHBA  
 27 enrollees; or that challenge a FEHBA carrier's institutional policies and practices.

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b. FEHBA's enforcement scheme provides the exclusive remedy for all claims that involve the interpretation of FEHBA contracts; that allege fraudulent, deceptive, or similarly wrongful conduct on the part of FEHBA carriers or their subcontractors in the course of providing services to FEHBA enrollees; or that challenge a FEHBA carrier's institutional policies and practices. For this reason, FEHBA "completely preempts" - and therefore makes removable - one or more of Plaintiffs' claims in this action.

12. Removal of an entire case is permitted if the Court has jurisdiction as to any claim against any Defendant. Consequently, so long as one of the Plaintiffs' claims as asserted against any Defendants are subject to removal, this Court can exercise jurisdiction over the entire case. See 28 U.S.C. §§ 1367, 1441(c).

13. All Defendants known to have been served with Plaintiffs' Second Amended Complaint have consented to this Notice of Removal.

**WHEREFORE, PREMISES CONSIDERED,** Defendants remove this action from the Superior Court of the State of California, County of San Diego - Central Division.

Respectfully Submitted,

Dated: May 30, 2008

By:

Vincent J. Iuliano  
Daniel S. Belsky, Esq.

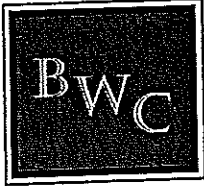
Vincent J. Iuliano, Esq.

Bruce W. Boetter, Esq.

Attorneys for Defendants

CELESTINE ARAMBULO, D.O., KAISER  
FOUNDATION HOSPITALS, SOUTHERN  
CALIFORNIA PERMANENTE MEDICAL GROUP, and  
KAISER FOUNDATION HEALTH PLAN, INC.

**EXHIBIT "2"**



BEACH | WHITMAN | COWDREY, LLP  
ATTORNEYS AT LAW

760 Paseo Camarillo, Suite 350  
Camarillo, California 93010  
Phone (805) 388-3100  
Facsimile (805) 388-3414  
www.beachwhitman.com

June 23, 2008

VIA FACSIMILE and U.S. MAIL  
(619) 298-7784

Bernard Lafer, Esq.  
7801 Mission Center Court, #430  
San Diego, CA 92108

Daniel S. Belsky, Esq.  
Vincent Juliano, Esq.  
Belsky & Associates  
591 Camino de la Reina, # 640,  
San Diego, CA 92108


Re: *Collier v. Paradise Hills Convalescent Center, et al.*  
San Diego Superior Court Case No: 37-2007-00075145-CU-MM-CTL

Dear Mr. Lafer and Mr. Belsky:

In light of the Notice of Removal filed by the Kaiser defendants, we plan to defer the filing of a responsive pleading on behalf of Paradise Hills Convalescent Center until the removal issue has been resolved by the Courts. If any party believes that a responsive pleading should be filed during the interim period, please feel free to contact me to discuss.

Very truly yours,

BEACH | WHITMAN | COWDREY, LLP



Janet G. Martin

JGM:fla

2576  
66

**EXHIBIT "3"**



BEACH | WHITMAN | COWDREY, LLP

760 PASEO CAMARILLO, SUITE 350  
CAMARILLO, CALIFORNIA 93010  
TELEPHONE: (805) 388-3100  
FACSIMILE: (805) 388-3414

Thomas E. Beach - State Bar No. 096321  
Janet G. Martin - State Bar No. 180735  
Attorneys for Defendant,  
PARADISE HILLS CONVALESCENT CENTER

SUPERIOR COURT OF THE STATE OF CALIFORNIA  
FOR THE COUNTY OF SAN DIEGO - CENTRAL DIVISION

FRANZISKA I. COLLIER, individually and as  
Administrator of the Estate of Edgar T. Collier,  
Deceased; KEA JADE COLLIER, a Minor, by  
her Guardian Ad Litem MICHAEL HYDE,

Plaintiffs,

vs.

PARADISE HILLS CONVALESCENT  
CENTER, a business entity, form unknown;  
DR. GAYNSKI; DR. C. ARAMBULO;  
KAISER FOUNDATION HOSPITALS;  
SOUTHERN CALIFORNIA PERMANENTE  
MEDICAL GROUP; KAISER FOUNDATION  
HEALTH PLAN, INC.; and DOES 1 through  
100, inclusive,

Defendants,

CASE NO: 37-2007-00075145-CU-MM-CTL  
Assigned to Department: C-66  
Hon.: Charles R. Hayes

**DEFENDANT PARADISE HILLS  
CONVALESCENT CENTER'S  
JOINDER IN DEFENDANTS  
CELESTINE ARAMBULO, D.O., KAISER  
FOUNDATION HOSPITALS, SOUTHERN  
CALIFORNIA PERMANENTE MEDICAL  
GROUP, AND KAISER FOUNDATION  
HEALTH PLAN, INC.'S NOTICE OF  
REMOVAL**

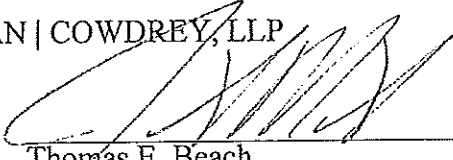
Defendant PARADISE HILLS CONVALESCENT CENTER, hereby joins in the  
"Defendants Celestine Arambulo, D.O., Kaiser Foundation Hospitals, Southern California  
Permanente Medical Group, and Kaiser Foundation Health Plan, Inc.'s Notice of Removal" filed by

2576  
m

co-defendants CELESTINE ARAMBULO, D.O., KAISER FOUNDATION HOSPITALS,  
SOUTHERN CALIFORNIA PERMANENTE MEDICAL GROUP, and KAISER FOUNDATION  
HEALTH PLAN, INC., on or about May 30, 2008.

Dated: June 23, 2008 BEACH | WHITMAN | COWDREY, LLP

By:

  
Thomas E. Beach  
Janet G. Martin  
Attorneys for Defendant,  
PARADISE HILLS CONVALESCENT CENTER

BEACH | WHITMAN | COWDREY, LLP

760 PASEO C. JILLO, SUITE 350  
CAMARILLO, CALIFORNIA 93010  
TELEPHONE: (805) 388-3100

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF VENTURA

I am employed in the County of Ventura, State of California. I am over the age of 18 and not a party to the within action. My business address is 760 Paseo Camarillo, Suite 350, Camarillo, California 93010.

On June 23, 2008, I served the foregoing document(s) described as: **DEFENDANT PARADISE HILLS CONVALESCENT CENTER JOINDER IN DEFENDANTS CELESTINE ARAMBULO, D.O., KAISER FOUNDATION HOSPITALS, SOUTHERN CALIFORNIA PERMANENTE MEDICAL GROUP, AND KAISER FOUNDATION HEALTH PLAN, INC.'S NOTICE OF REMOVAL** on the interested parties in this action, by placing \_\_\_\_\_ the original X a true copy thereof enclosed in a sealed envelope addressed as follows:

SEE ATTACHED SERVICE LIST

X (BY FIRST CLASS MAIL) I caused such envelope with postage thereon fully prepared to be placed in the United States mail at Camarillo, California. I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing. It is deposited with the U.S. Postal Service on that same day in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than 1 day after date of deposit for mailing in affidavit.


\_\_\_\_ (BY FACSIMILE TRANSMISSION) On this date, I transmitted from a facsimile transmission machine in Camarillo, California, whose telephone number is (805) 388-3414 the above-named document was transmitted to the interested parties herein whose facsimile transmission telephone numbers are included in the attached Service List. The above-described transmission was reported as complete without error by a transmission report issued by the facsimile transmission machine upon which the said transmission was made immediately following the transmission. A true and correct copy of the said transmission report is attached hereto and incorporated herein by this reference.

\_\_\_\_ (BY OVERNIGHT CARRIER) I placed the above-named document in an envelope or package designated by [GoldenState Overnight Carrier/UPS/Federal Express/Overnite Express] ("express service carrier") addressed to the parties listed on the service list herein, and caused such envelope with delivery fees paid or provided for to be deposited in a box maintained by the express service carrier. I am "readily familiar" with the firm's practice of collection and processing of correspondence and other documents for delivery by the express service carrier. It is deposited in a box maintained by the express service carrier on that same day in the ordinary course of business.

\_\_\_\_ (BY PERSONAL SERVICE) I delivered such envelope by hand to the office of the addressee.

X (State) I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on June 23, 2008, at Camarillo, California.

  
Tina L. Amoke

**SERVICE LIST**

**COLLIER v. PARADISE, SDSC CASE NO. 37-2007-00075145-CU-MM-CTL**

**ATTORNEY FOR PLAINTIFFS**

Bernard R. Lafer, Esq.  
7801 Mission Center Court, #430  
San Diego, CA 92108  
Phone: (619)298-1969  
Fax: (619)298-7784

**ATTORNEYS FOR DEFENDANTS, CELESTINE ARAMBULO, D.O., (ERRONEOUSLY  
SUED AND SERVED AS DR. C. ARAMBULO), KAISER FOUNDATION HOSPITALS,  
SOUTHERN CALIFORNIA PERMANENTE MEDICAL GROUPT AND KAISER  
FOUNDATION HEALTH PLAN, INC.**

Daniel S. Belsky, Esq.  
Vincent J. Iuliano, Esq.  
Bruce W. Boetter, Esq.  
Belsky & Associates  
591 Camino de la Reina, Suite 640  
San Diego, CA 92108  
Phone: (619) 497-2900  
Fax: (619) 497-2901

BEACH | WHITMAN | COWDREY, LLP  
760 PASEO C. ILLO, SUITE 350  
CAMARILLO, CALIFORNIA 93010  
TELEPHONE: (805) 388-3100

**EXHIBIT "4"**

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA

**NOTICE OF DOCUMENT DISCREPANCIES**

CASE NO.: 08cv969 L (POR) CASE TITLE: Collier, et al v. Paradise Hills, et al  
DOCUMENT RECEIVED  
ENTITLED: Deft Notice of Removal DATE: 6/24/2008

The above document(s) is/are returned unfiled for the reason(s) indicated below:

<i>Local Rule</i>	<i>Discrepancy</i>
<input type="checkbox"/> 3.1	Missing civil cover sheet or missing attorney's signature on civil cover sheet.
<input type="checkbox"/> 4.2	Missing filing fee or application to proceed in forma pauperis -- <i>application</i>
<input type="checkbox"/> 4.5	Incorrect filing fee: \$350.00 to file a civil action; \$5.00 for a habeas corpus
<input type="checkbox"/> 5.1.i or 47.1.b.1	Missing copy of document for judge and/or U.S Attorney
<input type="checkbox"/> 5.1.i.1	Missing original document
<input type="checkbox"/> 5.1.j.1	Missing name, address or phone number of attorney or individual appearing pro se
<input type="checkbox"/> 5.1.j.4	Missing signature on document
<input type="checkbox"/> 5.2	Missing proof of service
<input type="checkbox"/> 5.3.c	Document illegible or submitted on thermal facsimile paper
<input type="checkbox"/> 7.1.j or 47.1.d.1 & 47.1.d.2	Joinder(s): No pending motions on file. Each joinder must specifically identify the particular motions to which the joinder applies
<input type="checkbox"/> 30.1; 33.1 & 36.1	Unless filing is ordered by the court, no discovery (ie: depositions, interrogatories and requests for admissions) are filed in the district court
<input type="checkbox"/> 54.1	The cost bill shall specify the hour and date when application to the clerk to tax costs will be made
X	<u>OTHER: Case has already been Removed on 5/30/2008 (Doc #1)</u>

DATED: 6/24/2008

CLERK, U. S. DISTRICT COURT

By: K. Hammerly  
(Intake Clerk's Initials)

#2576  
Vg



**EXHIBIT "5"**

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA

FRANZISKA I. COLLIER, *et al.*,

Plaintiffs,

v.

PARADISE HILLS CONVALESCENT  
CENTER, *et al.*,

Defendants.

Civil No. 08cv969-L(POR)

**ORDER REMANDING ACTION TO  
STATE COURT**

On May 30, 2008, Defendants Celestine Arambulo, D.O., Kaiser Foundation Hospitals, Southern California Permanente Medical Group and Kaiser Foundation Health Plan, Inc. ("Removing Defendants") filed a notice of removal, removing this medical negligence and wrongful death action from state court. The notice of removal is based on 28 U.S.C. §§ 1441 and 1331.

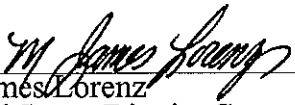
The federal court is one of limited jurisdiction. *See Gould v. Mutual Life Ins. Co. of N.Y.*, 790 F.2d 769, 774 (9th Cir. 1986). It possesses only that power authorized by the Constitution or a statute. *See Bender v. Williamsport Area Sch. Dist.*, 475 U.S. 534, 541 (1986). It is constitutionally required to raise issues related to federal subject matter jurisdiction, and may do so *sua sponte*. *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 93-94 (1998); *see Indus. Tectonics, Inc. v. Aero Alloy*, 912 F.2d 1090, 1092 (9th Cir. 1990). "The burden of establishing federal jurisdiction is on the party seeking removal, and the removal statute is strictly construed

1 against removal jurisdiction." *Nishimoto v. Federman-Bachrach & Assoc.*, 903 F.2d 709, 712  
2 n.3 (9th Cir. 1990).

3 In addition to the Removing Defendants, the complaint names Paradise Hills  
4 Convalescent Center as a Defendant. This Defendant has not joined in the removal. "Section  
5 1446 requires all proper defendants to join or consent to the removal notice." *Prize Frize, Inc. v.*  
6 *Matrix (U.S.), Inc.*, 167 F.3d 1261, 1266 (9th Cir. 1999), overruled on other grounds in *Abrego*  
7 *Abrego v. The Dow Chem. Co.*, 443 F.3d 676 (9th Cir. 2006). "Where fewer than all the  
8 defendants have joined in a removal action, the removing party has the burden under section  
9 1446(a) to explain affirmatively the absence of any co-defendants in the notice for removal." *Id.*  
10 No attempt to explain is made in the notice of removal. Accordingly, the notice of removal is  
11 defective on its face, and the case is **REMANDED** to the Superior Court of the State of  
12 California for the County of San Diego, Central Division.

13 **IT IS SO ORDERED.**

14  
15 DATED: June 30, 2008

16  
17   
M. James Lorenz  
United States District Court Judge

18 COPY TO:

19 HON. LOUISA S. PORTER  
UNITED STATES MAGISTRATE JUDGE

20 ALL PARTIES/COUNSEL  
21  
22  
23  
24  
25  
26  
27  
28

1 Daniel S. Belsky, Esq. (SBN 75810)  
Vincent J. Iuliano, Esq. (SBN 153594)  
2 Bruce W. Boetter, Esq. (SBN 188376)  
BELSKY & ASSOCIATES  
3 591 Camino de la Reina, Suite 640  
San Diego, CA 92108  
4 Telephone: (619) 497-2900  
Facsimile: (619) 497-2901

(SPACE BELOW FOR FILING STAMP ONLY)

5  
6 **United States District Court - Southern District of California**  
**Civil No. 08cv0969-L (POR)**  
*Collier v. Arambulo, D.O., et al.*  
7

8 **PROOF OF SERVICE**

9 I, the undersigned, declare: that I am, and was at the time of service of the papers herein  
referred to, over the age of 18 years, and not a party to the above-referenced action; and I am  
10 employed in the County of San Diego, California, in which county the mailing occurred. My  
business address is 591 Camino de la Reina, Suite 640, San Diego, California 92108. I am readily  
11 familiar with the practices of Belsky & Associates for collection and processing of correspondence  
for mailing with the United States Postal Service, Federal Express and UPS. Such correspondence  
12 is deposited with the United States Postal Service, Federal Express, or UPS the same day in the  
ordinary course of business. I served the following documents:

- 13 (1) **DEFENDANTS CELESTINE ARAMBULO, D.O., KAISER FOUNDATION**  
14 **HOSPITALS, SOUTHERN CALIFORNIA PERMANENTE MEDICAL**  
15 **GROUP, and KAISER FOUNDATION HEALTH PLAN, INC.'S *EX PARTE***  
**APPLICATION FOR RECONSIDERATION OF THE COURT'S ORDER**  
16 **REMANDING THE CASE TO STATE COURT;**  
17 (2) **DEFENDANTS CELESTINE ARAMBULO, D.O., KAISER FOUNDATION**  
18 **HOSPITALS, SOUTHERN CALIFORNIA PERMANENTE MEDICAL**  
19 **GROUP, and KAISER FOUNDATION HEALTH PLAN, INC.'S**  
**MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF *EX***  
***PARTE* APPLICATION FOR RECONSIDERATION OF THE COURT'S**  
**ORDER REMANDING THE CASE TO STATE COURT; and**  
20 (3) **DECLARATION OF VINCENT J. IULIANO, ESQ.**

21 of which the original document, or a true and correct copy, is attached, by placing a copy thereof in  
a separate envelope for each addressee named hereafter, addressed to each such addressee  
22 respectively as follows:

23 ///

24 ///

25 ///

26 ///

27 ///

28 ///

1 **United States District Court - Southern District of California**  
2 **Civil Action No. 08cv0969-L (POR)**  
3 *Collier v. Arambulo, D.O., et al.*

4 **PROOF OF SERVICE**

5 **Page 2**

6 Bernard R. Lafer, Esq.  
7 LAW OFFICES OF BERNARD R. LAFER  
8 7801 Mission Center Court, Suite 430  
9 San Diego, CA 92108  
10 (619) 298-1969 / (619) 298-7784 (Fax)  
11 **Attorney for Plaintiffs**  
12 **FRANZISKA I. COLLIER, individually, and**  
13 **as Administrator of the Estate of Edgar T.**  
14 **Collier, Deceased and KEA JADE**  
15 **COLLIER, a Minor by her Guardian Ad**  
16 **Litem MICHAEL HYDE**

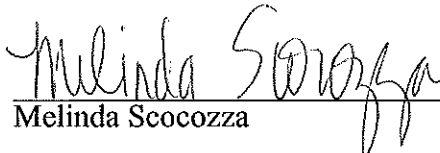
Lawrence A. Cox, Esq. (SBN 076140)  
Brian K. Condon, Esq. (SBN 138776)  
Courtney Stuart-Alban, Esq. (SBN 225513)  
ARNOLD & PORTER LLP  
777 South Figueroa Street, 44<sup>th</sup> Floor  
Los Angeles, CA 90017  
(213) 243-4000  
(213) 243-4199 (Fax)  
**Co-Counsel for Defendants**  
**CELESTINE ARAMBULO, D.O.,**  
**(erroneously sued and served as DR.**  
**C. ARAMBULO), KAISER**  
**FOUNDATION HOSPITALS,**  
**SOUTHERN CALIFORNIA**  
**PERMANENTE MEDICAL GROUP,**  
**KAISER FOUNDATION HEALTH PLAN,**  
**INC.**

15 Janet G. Martin, Esq.  
16 BEACH WHITMAN COWDREY, LLP  
17 760 Paseo Camarillo, Suite 350  
18 Camarillo, CA 93010  
19 (805) 388-3100  
(805) 388-3414 (Fax)  
**Attorneys for Defendant**  
**PARADISE HILLS CONVALESCENT**  
**CENTER**

20 I then sealed each envelope and placed them for collection and mailing on July 15, 2008.

21 I declare under penalty of perjury that the foregoing is true and correct.

22 Executed on July 15, 2008 at San Diego, California.

23  
24   
25 Melinda Scocozza  
26  
27  
28